No. 3813

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY
(a corporation),
Plaintiff in Error,

vs.

ISADORE GOLDSTEIN,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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While it is true that plaintiff in error concedes that there was probably a conflict of testimony upon the question of whether water came from the penstock prior to the slide, that conflict did not arise because of the matters and things referred to by the defendant in error in his brief. As stated in the opening argument, some witnesses including Mr. Hyle and Mr. Maynard, as well as others, testified to seeing what appeared to them from the streets of the town to be a stream coming from the flume. These witnesses, however, described a stream of such a character that it could not be a stream coming from the spout of the penstock. As stated in

the opening brief the spout of the penstock pointed north so that if a stream were coming from it the edge thereof only would be visible from the streets of the town, whereas each and all of the witnesses testifying to seeing the stream testified that the stream seen was one flowing in a westerly direction; that is to say, that it was such a stream that they looked into the face of it and could see the width of it. Now, there was a stream of water apparently coming from the flume that answered this description. It consisted, however, of surface water that was picked up by the snow sheds above the flume a short distance from the penstock and allowed to flow over the roof of the flume from whence it made its appearance as a stream of considerable magnitude spouting in the direction of the town. This stream looked like a stream coming from the flume to one standing on the streets of the city but was in fact a mere flow of surface water.

Several witnesses testified to this fact. Their testimony is well illustrated by that of Mr. Murphy who testified that he saw the water coming over the snow sheds and flowing down over the top of the flume for several days and that it appeared to him like water coming from the flume itself. That his office was right opposite the point where the water flowed and that he saw it daily; that he remained in this belief until he was told that this water was not coming from the flume at all but was surface water; that even then he was not satisfied but climbed to the flume level in order to investigate for

himself and found the statement to be correct. (See evidence Murphy, Rec. p. 840 et seq.)

The only reason that can be urged for the position that there was a conflict of testimony upon this question was that some of these witnesses spoke in a general way of the penstock as the point from which they saw the water flowing, and it was for this sole reason that it was conceded that there was probably a sufficient conflict in the testimony upon this question.

Counsel also refers to the testimony of Higgins, Noonan and others. These gentlemen actually did see water coming from the penstock before the buildings came down the hill side but not before the slide started. They saw the water coming from the penstock immediately prior to the time that the buildings came down the hill side and at least some time after the ground had started to move. Mr. Cook who was the only witness that saw the ground move prior to the time that the buildings came down, testified that he saw flashes at the point where the wires of the Gastineau Company and those of the Alaska Juneau Company crossed. That these flashes directed his attention to the hill side and while he was observing the hill side he saw a black crack where the ground had parted. This was several minutes before the buildings came down. (See evidence Cook, Rec. p. 750, et seq.)

As stated in the opening brief, it was the flashes observed by Cook that caused the short circuit which threw out the electric line that supplied the

current to the trommel screen motor. That these electrical disturbances occurred at the time indicated by Mr. Cook's testimony is evidenced by the testimony of the electrician in charge of the power house,—Mr. Bauzman, and the voltage chart which was offered in evidence and is printed as part of the record. (See evidence Bauzman, Rec. p. 908, et seq.)

While this was the time as shown by the testimony of the man in charge of the power house when the feeder or electrical circuit that supplied current for the trommel screen went out, electrical disturbances of a similar nature but which were not sufficiently violent to cause any of the feeders to go out, occurred earlier in the forenoon. In fact, three of these occurred between nine and ten o'clock.

Mr. Jackson the superintendent of the Gastineau Company testified he saw one of these flashes from his office in the Goldstein building; that he immediately called up the power house of the company and found that there had been a short circuit. (See evidence Jackson, Rec. p. 673, et seq.)

Mr. Clausen, the mill superintendent of the Alaska Juneau Company, observed three flashes between nine and ten and testified that there were short circuits following each flash. (See evidence Clausen, Rec. p. 731, et seq.)

There were other witnesses that testified to seeing these flashes and the witness Bauzman in charge of the power house testified that short circuits made their appearance at the time these flashes occurred.

These short circuits are registered on the voltage chart which is in evidence in the case as an exhibit. (See voltage chart, page 1064.)

All this testimony goes to show that the slides started at least as early as nine twenty-five in the morning. We are indulging in this discussion for the reason that we do not desire the court to receive an erroneous impression in regard to the situation as it actually was. The claim made by the plaintiff in error in its motion to direct a verdict and in its opening brief is that there was no evidence that the plaintiff in error was guilty of any of the specific acts of negligence charged in the bill of complaint or particulars, a matter that was fully discussed in the opening brief and to which no further reference will here be made, and also that even though it were conceded that the plaintiff in error was guilty of the negligent acts charged, the evidence conclusively shows that none of these acts contributed to cause the slide and the consequent damage. This question also was fully discussed in the opening brief and will not be further considered here. There is just one thing we wish to say in reply to statements of counsel in his brief upon this question: Counsel quotes from the testimony of the witness Crowther in which that witness testifies that in his opinion it would be good careful engineering to install a box to carry to a safe place any overflow water from the penstock. But this witness referred solely to penstocks that were used for the purpose of regulating the pressure in the pipe leading from

them so that the water might back up in them. Of course, in such a case a waste flume would be a necessity but this penstock was not such a penstock. As has already been shown in the opening brief, it was a mere device to get the water from a square container into a round container,—from a flume into a pipe. It was merely a part of the carrying system and as the pipe was larger than the flume the water could not back up and overflow. When that was made plain to Mr. Crowther he testified that no waste flume would under those circumstances be necessary. The testimony of the witness follows:

> "Q. Yes, exactly that is what I mean. I am assuming the carrying capacity of the service pipe is larger than the carrying capacity of the flume and that the service pipe is not obstructed; that it is entirely open. There would not under these circumstances be any occasion for an overflow out of the penstock would there?
>
> A. No, there would not."
>
> (See evidence Crowther, Rec. p. 156.)

At this point it must not be overlooked, however, that the negligence charged does not consist of not building a waste flume, but that it consists of not building a waste flume that would be installed for the purpose of carrying off water that might back up in the pipe and overflow.

Nor must the fact be lost sight of that the absence of the waste flume had nothing to do with the cause of the slide. All these matters were raised by motion to direct a verdict.

Coming now to the further point raised by the motion to direct a verdict: That there was no evidence of injury or resulting damage upon which the jury could base a verdict, we desire to say this in reply to what has been said by counsel for defendant in error: The first item discussed by counsel relates to the damage done to the store building. (See brief of counsel, page 5.) Counsel states in his brief that the plaintiff below testified that he based his estimate upon the cost of restoring the building to its original condition; that the repairs made necessary by the negligent acts of defendant below immediately after the damage had been inflicted would cause the amount mentioned, to wit, fifteen hundred dollars; that this was his best judgment based upon his experience and the result of investigation made by him of persons qualified to speak upon the subject.

But counsel's interpretation of Mr. Goldstein's testimony is erroneous. An examination of the record will show that the testimony of the witness does not admit of such interpretation. The plaintiff did not testify that he repaired the building and he did not testify as to what it would cost to repair it. What he testified to was what in his judgment was the damage done to the building, or, as he puts it "the value of the damages". The testimony of the plaintiff upon this subject is as follows:

> "Q. You may use that in describing the different values.
>
> A. You mean the value of the property or the value of the damages. I estimated the value

of the damage done to the property.

Q. Give us the estimated damage.

A. The damage I consider done to the store building was fifteen hundred dollars.

Q. How did you arrive at that figure?

A. I estimated the value of it.

Q. What did you base that estimate on?

A. What it cost to do the work at the present time or did at the time of the slide.

Q. Have you made inquiries as to what it would cost?

A. I have made inquiries of different carpenters."

(See evidence Goldstein, Rec. p. 207.)

It will be seen, therefore, that no evidence was offered by plaintiff whatsoever upon the question of the cost of repair and no evidence was offered to show of what the damage or injury to the building consisted so that the jury might have some idea of what had happened to the building. The plaintiff was simply asked to invade the province of the jury and give an estimate not of what it would cost to repair the building but of what the damage had been. There was no chance in the world for the plaintiff in error to call witnesses to rebut this kind of testimony. No builders could be called to say what the repairs could be made for because there was no evidence of what the injury consisted.

Defendant in error charges that no objection was made to this evidence. Aside from the fact that this evidence might be competent and proper enough to be introduced in a preliminary way to be followed by some real evidence upon the subject, the fact that the evidence was not objected to does not add

to its weight. It merely waives any objection to its competency or relevancy or materiality. As was stated by the Supreme Court of North Dakota in the case of American Coal Briquetting Company v. Minneapolis, St. Paul and S. S. M. Ry. Co., 170 N. W. 570, cited on page 57 of the opening brief:

> "While the failure to object may constitute waiver of the incompetency of the evidence it is not a waiver of the right to question its legal effect or its legal sufficiency."

On page 5 of the brief it is further contended by counsel for the defendant in error that if there was any insufficiency in the testimony on the part of his client it might have been supplied by cross-examining the witness Goldstein. Surely the duty does not rest upon the opposing party to prove the plaintiff's case by cross-examining his witnesses. Furthermore, had such attempt been made under the laws of Alaska where the strict rules of cross-examination obtain, an objection to the questions asked would have been properly sustained on the ground that it was not cross-examination.

Coming now to the authorities cited by counsel under this particular head.

It is contended by counsel that the proper measure of damages is the cost of repair. Why he should so contend it is difficult to conceive because there is no evidence in the record to show what the cost of repair would be. Nor can it be said that the cost of repair would in all cases be the proper measure of damages. Whether it would or not

would depend largely upon the question of what the extent of the damage was and the circumstances and conditions under which it occurred.

If the extent of the damage were great and the structure injured one that was practically worthless, clearly the costs of repair would not be a proper measure of damage. To illustrate: A building situated in a mining camp, such as Juneau, may be of far greater value one day than it is the next. The opening up of a new mine or the closing down of an existing mine directly affects the value of the neighboring property. What may be a valuable building in the mining camp today may be practically worthless a week hence. Clearly under these circumstances, the cost of repair would not be the measure of damages of a building that had so become worthless.

Juneau is a mining camp. In all mining camps the values of property fluctuate. So that unless the damage is trifling the just and reasonable measure of damage would be the difference in market value before the injury and after the injury.

Nor is the cost of repair ever regarded as the proper measure of damages unless the extent of the injury can be clearly shown and the facts relative thereto demonstrated in such a way that the cost may be accurately estimated and a review of the cases cited by counsel will show that wherever the cost of repair has been held to be a proper measure of damages, all these details were clearly shown in evidence, so that the jury could clearly see just what had to be repaired.

The first case cited by counsel is Watson v. Pacific Power Company, 156 N. W. 186.

In this case the court not only uses the language quoted by counsel but adds to it other qualifying phrases. The trial court had instructed the jury that the measure of damages was the reasonable cost of restoring the injured buildings to the condition they were in immediately before the injury. It was contended that this was error and that the true measure of damages was the difference between the value of the property immediately before and immediately after the injury. The court say:

> "The measure of damage for injury to real property is not invariable and there may be circumstances under which either of the rules stated would be applicable. The rule stated by appellant is more often applied where the damage is permanent or can not well be expressed in specific items of injury capable of easy repair or remedy, but does affect in some substantial degree the value of the property as a unit. But where the injury is susceptible of remedy at moderate expense and the cost of restoring it may be shown with reasonable certainty, the rule given the jury by the trial court is entirely proper."

It will be observed, therefore, that under this decision the measure of damages would be the difference in market value unless the injury is susceptible of remedy at moderate expense and the cost of restoring it may be shown with reasonable certainty. And again that the rule to the effect that the difference in market value is the measure of damages is applicable where the damage is perma-

nent or can not well be expressed in specific items of injury capable of easy remedy or repair.

Surely there is nothing in the evidence in this case showing any specific items of injury capable of easy repair or not capable of easy repair; nor is there anything here to show that the cost of restoring it may be shown with reasonable certainty. Nor is there any evidence as we have already pointed out to show what the actual cost of repair would be, the plaintiff's testimony being nothing more nor less than an estimate of the damages and not a statement of what the cost of repair would be.

Referring to the second item of damage, that which was done to the merchandise, dealt with on page 6 of defendant in error's brief, the witness Goldstein on cross-examination testified in answer to questions as follows:

> "Q. The items of damaged stock you had in there—do you remember what particular articles of merchandise were damaged in the store —not in the warehouse now—in the store?
>
> A. I wouldn't say the particular items, no.
>
> Q. Did you make a list of those things that were damaged at that time?
>
> A. I did not.
>
> Q. And your estimate as to what the estimate was is a mere estimate?
>
> A. A mere estimate.
>
> Q. You wouldn't be able to tell us now what that damage consisted of, that is to say, what the articles were that were damaged?
>
> A. No.
>
> Q. You don't know whether it was tins or bulk?
>
> A. I know it was all included in that. I don't know just the particular stuff I lost there

—I don't know the articles—I know some of them but I don't know just how much.

Q. The estimate of the damage in the store was in your judgment fifteen hundred dollars?

A. I don't know whether it was fifteen hundred. I read it off the list here.

Q. Fifteen hundred is my recollection.

A. Twenty-five hundred.

Q. That twenty-five hundred, is that damage to the stock in the store?

A. What stock in the store?

Q. You don't know what the damage was that was done?

A. I am estimating how much damage was done—I wouldn't come here on oath and testify how much damage was done because there is no way of figuring it up—because that stuff was going right out of the front door and I didn't stand there in the door as it went out of the store.

Q. You don't know what it was that went out at that time?

A. I do not, no sir.

Q. Your estimate is based upon your best judgment as to what you think your damage was?

A. Yes, sir.

Q. You wouldn't testify that that was it or wasn't it, is that right?

A. I would not.

Q. And that is true of the other things you have spoken of?

A. It is."

(See evidence Goldstein, Rec. p. 212 et seq.)

Now, it may be true enough in a case like this a plaintiff may recover even though he can not furnish an itemized list of articles damaged or lost, but he must show something. It will not do for him to say "I don't know what I lost, but I

think I should recover whatever amount I have on my list here" whether it is fifteen hundred or twenty-five hundred. If a party comes in as was done in the case cited by counsel, to which further reference will be later on made, brings in an inventory, books of account and other evidence showing what property was there before the injury, and an inventory or other evidence showing what was there after the injury, so there may be some way of arriving at what the missing property in a general way at least consisted of and what its value was, and further shows such facts as are within his reach in relation both to the character of the property and its market value, then the opposing party may be able to rebut the testimony offered showing that property of such character was worth less. But here we have a case where no attempt whatsoever is made to show what was lost or injured, although the witness Goldstein testified that he knows what some of the articles were and surely he must have had inventories and invoices to show in a general way what if anything was lost.

The testimony of the witness simply amounts to this: He said: I do not know what I lost; I will not swear as to what my loss consisted of, and I do not know whether it is fifteen hundred dollars or some other amount, but I think I should recover fifteen hundred dollars or twenty-five hundred dollars. The record leaves the testimony of the witness in doubt upon this point.

Referring to the first case cited by counsel under this head—Union Pacific R. Co. v. Lucas, 136 Fed. 374:

It will be observed that while the witness in that case testified to the value of his stock in a lump sum, testimony had already been offered to the effect that he was the manager of the business, knew the value of the stock, and that his last inventory which had been carefully made was destroyed in the same fire; that he could not give the items of which the stock consisted in detail. Here was a case where the entire stock had been destroyed, where the witness had in mind an inventory carefully made, so that he would know the exact value of the stock as a whole, and he was permitted to testify what that was. Surely that is not the situation in the case at bar. The witness in the case at bar says that he does not know what the items destroyed were except as to some of them, and as to what these items were concerning which he had knowledge he does not testify. No evidence is offered that he had taken an inventory that had given him information concerning such articles, or that he had in fact any knowledge concerning them, he himself making the statement that he would not swear whether it was fifteen hundred dollars or was not fifteen hundred dollars that he lost.

Referring to the case of Coleman v. Retail Lumbermen's Association, 75 N. W. 588, the next case

cited by counsel, we find this citation as shown by the opinion on page 589:

> "For the purpose of proving the amount on hand just prior to the fire, plaintiff proved the amount on hand on January 1, 1896, when an inventory of the stock on hand was taken; he then proved his books of account in the manner provided by Section 5738, General Statutes 1894, and introduced them in evidence for the purpose of showing the amount of lumber since purchased and the amount since sold."

The opinion further says that an inventory was taken after the fire and that the amount of lumber destroyed was thus determined.

If any such procedure had been followed in the case at bar there would have been no ground of complaint.

In the case of Jensen v. Palatine Insurance Company, 116 N. W. 286, the third case cited by counsel under this head, the court seemed to hold that the rule stated by them in the opinion quoted by counsel applies only where there is a total loss of property and not where there is a partial loss. There had been a previous decision by the same court in which a rule seemingly different from that adopted by the court in this case had been adopted, but the court distinguished that case from the case then under consideration upon the ground that in the former case the loss was not total but merely partial. The court say after using the language quoted by counsel:

> "The defendant insists that a different rule was adopted by this court in British American

Insurance Company of New York v. Columbian Optical Company, 108 N. W. 130. In that case there was not a total loss."

Referring now to the third item: Damage done to the warehouse.

The testimony of the witness upon this item is as follows:

"Q. Go ahead.
A. Warehouse damages fifteen hundred dollars. I had to rebuild that.
Q. How much did it cost to rebuild it.
A. It cost me—well it isn't finished yet—I have spent about seven hundred dollars on it so far but it is just about half completed—haven't been able to finish it up."

That is the extent of the testimony upon that item. The witness says he had to rebuild it; that he had spent about seven hundred dollars on it so far, and that it is about half completed, but he does not shed any light on the character of building it was,—whether it was a large building or a small building; whether it was made of wood or stone; whether it was old or new; how long it had been in use or in what condition of repair it was. The fact that it cost fourteen hundred dollars to rebuild it did not necessarily mean that the witness was damaged fourteen hundred dollars. If he had an old shack in the first place, it might not have been worth a hundred dollars and he would not be in a position to ask the plaintiff in error to pay him the price of a new building. On the other hand, if he had a new building in the first place, one that had

just been erected and no conditions existed in the community which had taken the value out of the property itself, there may be reason for saying that he would be entitled to what it cost to rebuild it. But even then, under the authorities, where the building was entirely destroyed the measure of damages would be its market value and not the cost of repair or reconstruction. And in any event it was necessary to show what the character of building was before the slide and why it was worth something.

Counsel cites the case of Kennedy v. Treleaven, 175 Pac. 977, to show that market value is not always the true measure of damages in cases where property is destroyed. In that case, however, the court used this language:

> "It is frequently said that the market value of the property destroyed at the time and place of the fire is a proper measure and this is true if the property in fact had a market value. If there be no market value then another criterion of value must be found and the best evidence that can be obtained must be produced to show the elements which enter into the real value."

What elements entering into the real value did the plaintiff prove in this case?

The only description we have of the building lost is that it was a warehouse. Clearly, the law of this case is not altogether applicable. The court, in this decision, also referred to Ruling Case Law, Volume 8, page 485, where, after stating that recovery may be had either for damage to the freehold or to the property in its detached form, it said:

> "If recovery is sought for the value of the property destroyed in its detached form the measure of damages is its market value when so detached."

In this same volume of Ruling Case Law, Section 186, which deals with value and injuries to property generally after stating how market value must be proven if the property has a market value, the rule is laid down giving the proof that must be offered in cases where property has no market value in the following words:

> "If an article has no market value its worth may be shown by proof of such elements or facts affecting the question as may exist, such as its cost, its utility and use, and the extent to which it has deteriorated, if any."

The next item of damage dealt with in the brief of counsel is the damage to the apartment house. Counsel *assumes* that the evidence shows that this apartment house was totally destroyed; that it cost the defendant in error eight thousand dollars, and that eighty-five hundred dollars was the cost of its reconstruction. The statement is further made that the building was comparatively new. The trial court in its opinion rendered upon the motion for a new trial fell into the same error with reference to the destruction of the apartment house. The evidence given by the witness Goldstein upon this question is as follows:

> "Q. Go ahead.
> A. The apartment house on the hill was eight thousand five hundred dollars.
> Q. How did you decide on that?

A. That is what it would cost me to rebuild it. I have had estimates from carpenters what it would cost to rebuild that property and there was fixtures in the apartment house, two thousand dollars, there were four five-room apartments."

(See evidence Goldstein, Rec. p. 208.)

On cross-examination the witness testified:

"Q. The buildings, how much did they cost you?

A. I don't remember what that was either but I know the apartment house cost me about eight thousand dollars.

Q. And as to the rest of the buildings, you don't know?

A. I don't know.

Q. When was the apartment house built?

A. 1913, I think it was 1913 or 1914.

Q. And you have rented it ever since to tenants?

A. Yes, sir.

Q. Occupied pretty nearly all the time?

A. Not all of the time; they were moving in and out of it nearly all the time.

Q. It had been used as a building for rent?

A. Yes, sir."

(See evidence Goldstein, Rec. p. 214.)

Now, there is nothing in this testimony to show that the apartment house was destroyed by the slide either partially or otherwise, and, on the contrary, the evidence of Mr. Hargreaves, a witness quoted by the plaintiff in error, is to the effect that it was not damaged very much. After testifying that he made a survey on May 21st, following the slide, he testified (referring to a map in evidence) as follows:

"Q. The buildings between Gastineau Avenue and Front Street that you have indicated there, what do they indicate?

A. Indicates buildings as they were before the slide as near as I could get the information; and *the real black ones, they were there at the time I surveyed the ground,* with the exception of one——one has since been torn down.

Q. The two buildings in black lines, they were there at the time you made your survey?

A. Yes.

Q. When was that?

A. May 21st.

Q. What is this little building above the black line?

A. That is still there.

Q. Do you know what that was?

A. A little shack.

Q. *What is the other one down below that?*

A. *It appears to be a series of shacks or apartments—a long row of buildings.*

Q. *That is one of Mr. Goldstein's apartment houses?*

A. *So I understand.*"

Whether the building was destroyed or not is a question at least left in doubt by the testimony. There is no evidence to show what kind of a building it was, of what material it was constructed, what its condition of repair was. Instead of being new the witness Goldstein has testified it was built in 1913 or 1914. A wooden building of that age would be pretty well used up unless kept in repair, especially when rented to tenants that constantly moved in and out as Mr. Goldstein said his tenants did. The only thing the witness testifies to in regard to the building is that it had five apartments.

Now how can any one say from the evidence whether the estimate that Mr. Goldstein received from carpenters touching cost of rebuilding the apartment house was correct or not. The carpenters were not called; no one having special knowledge upon the subject of cost of construction was called to testify. There was not a word of evidence showing to what extent the building had deteriorated, if at all. Mr. Goldstein merely comes in and asks the court to allow him eighty-five hundred dollars which he says is the amount according to the estimates of carpenters to whom he has talked that it will cost to give him a new building. He admits the building only cost him eight thousand dollars and that this included all the fixtures for which he now seeks two thousand dollars extra. This would leave the cost of the building minus the fixtures six thousand dollars. No excuse is given why he should be paid twenty-five hundred dollars more than the building originally cost him when it was new. The whole thing is left to conjecture.

The next item referred to by counsel in his brief on page 9 deals with the value of the fixtures and the furniture in the apartment house. The witness Goldstein gave an itemized list of those articles and estimated the value of each article but he did not testify concerning the condition of repair the articles were in, whether they were old or new, good or bad. On cross-examination he testified he did not know the cost of the articles, the testimony being as follows:

"Q. Your furniture in the apartment house, Mr. Goldstein, did that cost you the amount of money that you say it did or which you estimate it was worth at the time of the slide?

A. I estimate it was worth that at the time of the slide.

Q. But it cost you less than that didn't it?

A. I don't know whether it did or not; I don't know what I did pay for it."

(See evidence Goldstein, Rec. p. 214.)

And again on cross-examination, the witness testified after testifying that the apartment house had cost him eight thousand dollars:

"Q. That included the plumbing and the plumbing fixtures and everything like that?

A. Yes, sir."

(See evidence Goldstein, Rec. p. 215.)

Whether the plaintiff is seeking a double recovery, —one for the value of the fixtures in the apartment house and another for the value of the fixtures separated from the apartment house, is not clear. In any event there is no testimony on the question of whether there was any salvage; no question touching the extent of the injury done to this furniture or fixtures; no testimony as to what its condition was at the time of the injury if injured, and no competent evidence of its market value.

On page 9 of his brief defendant in error's counsel makes the statement that the various items heretofore referred to were the only ones to which the plaintiff in error made objection. In this connection it must be understood that the other items re-

ferred to in the complaint and bill of particulars had already been ruled out by the trial court before this writ of error was sued out. A motion for a new trial had been made and the trial court held that there was no evidence to support a verdict for damages as far as any of the other items mentioned were concerned, and for that reason the sufficiency of the evidence touching those items has not been discussed.

The character of the other cases cited by counsel may be shown by reference to one or two of them. The case of Chicago and E. Ry. Co. v. Ohio City Lumber Company, 214 Fed. 751, for instance, was a case where two men had made a detailed inventory of the property after the fire which were included in proofs of loss to the insurance company. These proofs of loss purported to give statements in detail of the lumber, glass, hardware and other property which was burned. In making out these statements the parties had before them the inventory, the books of record, the original invoices and all that sort of data and the question was whether these statements could be used after the original data from which they had been made up had been inadvertently destroyed. (See page 756 of the opinion.)

Several cases are cited to show that the witness Goldstein might be qualified to express an opinion of the value of the various items of property destroyed, but no cases hold that any witness, Mr. Goldstein or any one else, is qualified to express an

opinion touching the value of articles without knowing what those articles are.

Counsel quotes from Wigmore on Evidence, section 117, to show that a person familiar with his own property may under certain circumstances be allowed to estimate its worth even though he would not be otherwise qualified. He inadvertently, however, has omitted a parenthetical expression occurring in the text.

According to counsel's brief the text reads:

> "The weight of his testimony may be left to the jury."

The language of the text is:

> "The weight of his testimony (which often would be trifling) may be left to the jury."

However, that may be, neither Wigmore nor any other authority has held that such cases as are contained in this record are evidence either of injury or damage.

In completing his brief counsel calls the court's attention to the fact that the record fails to show that the plaintiff in error at any time objected to the testimony given by the defendant in error upon the amount of damages sustained by him and that the defendant freely entered upon the cross-examination and did not offer any testimony showing or tending to show that the several amounts testified to by the defendant in error were merely speculative, false or fanciful. In reply to this we desire to say that the plaintiff in error objected to the sufficiency

ments upon the fact that no evidence was offered to rebut the testimony of the plaintiff but in that case a detailed description of the character of the property lost was before the court, and this consisted at least in large part of staple articles of merchandise. Of course, it would be easy under those circumstances to disprove any value that might be placed upon those articles if it was too high, but as already shown that is not the situation in the case we are now discussing.

We have considered these matters at some length and have probably been obliged to repeat some things already stated in the opening brief. We ask the court to indulge us in this regard, as this was made necessary by the fact that we were unable to present an oral argument, which of course would have been far more satisfactory, and would have enabled us to point out more in detail the objections which we have set forth in this and in the opening brief.

For the reasons we have stated, we think the judgment of the lower court should be reversed and a new trial granted.

Dated, Alaska,
March 22, 1922.

Respectfully submitted,

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Attorneys for Plaintiff in Error.